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New Guidance Issued by the Department of Labor on Coordination of Paid Leave Under the Families First Coronavirus Response Act

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In an effort to offset the impact of the current coronavirus ("COVID-19") epidemic, Congress passed the Families First Coronavirus Response Act ("FFCRA"), which was then signed into law by the President on March 18, 2020. Under the FFCRA, there are two new paid leave provisions: the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLA"). (For a more detailed overview of these provisions, please see Cullen and Dykman's previous client alert here). Some aspects of EPSLA and EFMLA were later amended by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").

The Department of Labor ("DOL") has previously provided information regarding employees' rights and employer requirements under the FFCRA. This week, as the DOL ended its temporary non-enforcement of the FFCRA's paid leave protections, it also updated its FFCRA Frequently Asked Questions ("FAQs"). A key addition provided more clarification on when EPSLA, EFMLA, and an employee's regular paid time off ("PTO") can run concurrently and who - the employee or the employer – is permitted to decide if they will.

Under EPSLA, a covered and qualified employee is entitled to up to two weeks (80 hours) of paid sick leave - to be paid at the higher of either the employee's normal pay, federal minimum wage, or the applicable state or local minimum wage (subject to statutory limits) - for a qualified COVID-19 related reason, such as when the employee is quarantined pursuant to a government order. Additionally, a covered and qualified employee is entitled to take up to two weeks (80 hours) of paid sick leave, though at two-thirds of the higher of either the employee's normal pay, federal minimum wage, or the applicable state or local minimum wage (subject to statutory limits), in order to care for an individual who is quarantined per a government order or health care provider's advice, to care for a qualified child whose school or childcare is closed or unavailable due to COVID-19, or "if the employee is experiencing any other substantially-similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury."

Under EFMLA, a covered and qualified employee may take up to twelve weeks of leave if they are unable to work in order to provide childcare for a qualified child whose school or childcare provider is closed or unavailable due to COVID-19. The first two weeks of EFMLA leave are unpaid and the employee is paid at two-thirds of the higher of either the employee's normal pay, federal minimum wage, or the applicable state or local minimum wage (subject to statutory limits) for the remaining ten weeks.

Regarding EPSLA and PTO, "[a]n employer may not require employer-provided paid leave to run concurrently with-that is, cover the same hours as-paid sick leave under the Emergency Paid Sick Leave Act" because EPSLA leave "is in addition to any form of paid or unpaid leave provided by an employer, law, or an applicable collective bargaining agreement." Thus, the employee can't be forced to have these paid leave options run concurrently.

For the first two weeks of EFMLA leave, while employers are not permitted to require it, employees "may elect to take paid sick leave under [EPSLA] or paid leave under the employer's plan for the first two weeks of unpaid expanded family and medical leave, but not both." However, if the employee has previously taken leave under EPSLA, the employee can only take whatever time remains to them under EPSLA during the first two weeks of EFMLA; thus, the full two weeks may no longer be fully covered and the employee would not be paid for days in excess of their remaining EPSLA time.

Regarding the ten paid weeks under EFMLA and PTO, however, "an employer may require that any paid leave available to an employee under the employer's policies to allow an employee to care for his or her child or children because their school or place of care is closed (or child care provider is unavailable) due to a COVID-19 related reason run concurrently with paid expanded family and medical leave." The FAQs note that the employer must pay the employee at their normal rate of pay until the employer's policy's leave – which includes vacation and personal leave but "typically not sick or medical leave" – is depleted, but will only get tax credit in accordance with the EFMLA's daily pay amounts and aggregate limits (for each employee, $200 a day and $10,000 total). Once the employer's leave has been depleted, the employee may then take any time remaining under EFMLA "in the amounts and subject to the daily and aggregate limits" in EFMLA.

Notably, if the employer and employee agree, subject to federal and state law, "paid leave provided by an employer may supplement 2/3 pay" of EFMLA "so that the employee may receive the full amount of the employee's normal compensation."

We will continue to update this as more information becomes available. In the meantime, if you have questions regarding any aspects of employment law and/or the implications of the coronavirus ("COVID-19") on your place of business, feel free to contact James G. Ryan at (516) 357-3750 or via email at **jryan@cullenllp.com**, Thomas B. Wassel at (516) 357-3868 or via email at **twassel@cullenllp.com**, or Hayley B. Dryer at (516) 357-3745 or via email at **hdryer@cullenllp.com**.

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